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ARIZONA SUPERIOR COURT

YAVAPAI COUNTY

STATE OF ARIZONA, Plaintiff, v. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR201001325 **RESPONSE TO STATE'S MOTION PURSUANT TO RULE 15.3 FOR DEPOSITION OF WITNESS JOHN SEARS** (Assigned to Hon. Warren R. Darrow Division PTB)

The State's motion to depose John Sears under Rule 15.3, Arizona Rules of Criminal Procedure, should be denied. The State's burden is to establish the materiality of the witness and to make a preliminary showing that the witness's testimony could result in admissible evidence that would support a conviction, i.e., that the witness is material. The State has made a number of conclusory assertions, but has made no offer of proof or showing that Mr. Sears' testimony is material to its case in chief. Its motion should be denied.

This response is supported by the accompanying memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 15.3, Arizona Rules of Criminal Procedure, provides that upon the motion of any party the Court has the discretion to order a deposition of any person if: (1) the party shows that the person's testimony is material to the case or necessary to adequately investigate the offense[1]; (2) that the person was not a witness at a preliminary hearing; and (3) that the person will not cooperate in the granting of a personal interview.

As this Court is fully aware, John Sears was one of the defense lawyers for the defendant, Steven DeMocker, in prior criminal proceedings. He and other members of the defense team were subsequently replaced by Mr. DeMocker's current counsel, Craig Williams and Greg Parzych. Mr. DeMocker's trial is set to begin on September 7, 2011. Mr. Sears remains subject to the attorney-client privilege, the work product privilege, and his duty of confidentiality under ER 1.6.

1. Mr. Sears Was Not Uncooperative.

Initially, Mr. Sears has not been uncooperative in the granting of an interview. When asked by the State for dates on which he could be interviewed, Mr. Sears responded that he was not authorized to reveal privileged or confidential information, declined to be interviewed on privileged and confidential matters, and requested a conference to discuss what nonprivileged/nonconfidential information the State might be

[1] Given that the State is seeking this deposition just a few weeks before the beginning of the trial, the State would be hard pressed to say this deposition is not part of an ongoing investigation rather than that it is contemplating using Mr. Sears as a witness at trial. If it is the former, then Rule 15.3 does not permit a deposition of Mr. Sears in this case.

seeking.[2] This was not only a legitimate request by Mr. Sears, it is exactly the kind of information that the State would have to provide to this Court to get an order authorizing a deposition under Criminal Rule 15.3.

The State declined to follow-up on Mr. Sears' request to discuss what nonprivileged/nonconfidential information it might be seeking. Rather, the State moved this Court to order his deposition. In so doing, the State avowed to the Court that it "has no intention of questioning Mr. Sears on any confidential or privileged conversations he may have had with the defendant." Confusingly, the State goes on to say, "[i]n situations where Mr. Sears has spoken on the record, or where there has been a waiver of the attorney client privilege, or where he has acted alone or in concert with the defendant, the State, in order to be properly prepared for trial, has to depose Mr. Sears."

Frankly, this assertion is both incomprehensible and inadequate to justify a deposition under Rule 15.3.

2. The State Has Failed to Establish that Mr. Sears Is a Material Witness.

In *State v. Fuller*, 143 Ariz. 571, 694 P.2d 1185 (Ariz. 1985), the Arizona Supreme Court stated that for a party to be granted a deposition of a witness in a criminal case, the party had to make *prima facie* showing of materiality -- that the witness had

[2] As set out in the State's Motion, on July 19, 2011, the State emailed Mr. Sears and requested available dates for him to be interviewed. Mr. Sears responded that he is subject to both the attorney-client privilege and the duty of confidentiality to Mr. DeMocker under ER 1.6. Consequently, he advised the State that he did "not believe there is any other material or relevant information that I might provide that could be discussed in such an interview, and I therefore respectfully decline the invitation." However, Mr. Sears went on to state that "if you think a discussion of what it is specifically that you want to ask me might be productive, please contact me."

testimony sufficient to affect the outcome of the case. Although *Fuller* involved a request for a deposition by a defendant, the concepts remain the same.[3]

Initially, the Arizona Supreme Court noted that "whether to order a deposition under Rule 15.3 is a matter within the discretion of the trial court." *Id.* at 574 (citing *State v. Schoonover*, 128 Ariz. 411, 626 P.2d 141 (App. 1981). Before that discretion may be exercised, however, the moving party must make an offer of proof sufficient to meet the materiality element of Rule 15.3(a)(1):

> [Although the court had the discretion to order a deposition] it should have denied appellant's motion. Appellant's offer of proof was insufficient to meet the materiality requirement of Rule 15.3(a)(1). To meet this requirement, "[t]he defendant must show the materiality of the witness, and make at least a preliminary showing that the [witness's] testimony might result in exonerating the defendant ...."

Id. (citing *State v. Jessen*, 134 Ariz. 458, 462, 657 P.2d 871, 875 (1982).

In *Fuller*, the Arizona Supreme Court held that because the moving party had failed to make a preliminary showing that the witness had testimony that was might result in exoneration, a deposition could not be ordered under Rule 15.3. The State has a similar burden regarding materiality; that is, the State must make a preliminary showing that Mr. Sears has admissible testimony that could result in a conviction. The State has failed to make this showing. On this basis alone, the State's motion for a deposition of Mr. Sears should be denied.

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[3] Material evidence is not only evidence that is both relevant and admissible, but also is generally perceived to be at least somewhat unique and not obtainable by other reasonably available means. See, e.g., *State v. Walker*, 185, Ariz. 228, 914 P.2d 1320 (Ariz. App. 1995).

3. A Lawyer's Duty of Confidentiality Under ER 1.6 Is Extremely Broad.

Mr. Sears, moreover, is not just any witness; he is Mr. DeMocker's prior counsel. Mr. DeMocker has not waived the attorney-client privilege nor has he relieved Mr. Sears from his duty of confidentiality under ER 1.6. With that in mind, what is left?

Clearly, Mr. Sears cannot reveal privileged information. However, he also has an ethical duty under ER 1.6 not to reveal information that *relates* to his representation of Mr. DeMocker:

> A lawyer *shall not* reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c), or (d) or ER 3.3(a)(3).

ER 1.6(a) (emphasis added).

Mr. DeMocker has *not* consented to the disclosure of this information and the exceptions in ER 1.6, which largely deal with prospective conduct, simply do not apply. The law recognizes, moreover, that a lawyer's duty of confidentiality is broader than the attorney-client privilege and the work product doctrine, and that it applies not only in situations in which those privileges arise, but elsewhere as well:

> The confidentiality rule ... applies not only to matters communicated in confidence by the client, but also *to all information relating to the representation*, whatever its source. A lawyer may not disclose such information except as authorized ... *this prohibition also applies to disclosure by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.*

Comments 3 and 4 to ER 1.6 (emphasis added).

Mr. Sears has not been authorized to reveal privileged or confidential information. No exceptions otherwise apply. The State has represented to the Court that it will not make inquiry of Mr. Sears into privileged or confidential matters. Yet the State has made no showing of what information it otherwise would seek or that it would be material. We do not think the State can make this showing. Failing that, on these broad bases, the State's motion must be denied.

4. The State Has Failed to Meet Its Burden in General and in Particular.

To be specific, the State has made no showing that Mr. Sears is a material witness on any of the three topics it purports to seek information. Regarding the Calloway club cover, on or about July 27, 2010, the parties in this matter stipulated that "on July 5th, 2008, Mr. Sears took possession of a Calloway golf club head cover from Mr. DeMocker. Mr. Sears inspected the cover, and finding no apparent biological evidence on it, placed it in a sealed envelope and kept it in his locked office for safekeeping until October 23, 2008, when Mr. Sears turned the head cover over to law enforcement at their request."

The State has made no showing that any other information elicited from Mr. Sears, other than privileged and confidential information, would or could be material to its case on this topic.

Regarding the anonymous email and voice in the vent, the State has in its possession ample amounts of information and evidence, including, but not limited to taped statements of Mr. Sears discussing both of these topics. Although the State alleges that it concluded that the vent story was totally fabricated, and that Mr. Sears is a material witness in its case charging Mr. DeMocker with fraudulent schemes, conspiracy,

forgeries, etc., it has made no showing of any information it would seek to elicit from Mr. Sears that is not confidential, privileged, cumulative, or otherwise inadmissible.

Finally, regarding the estate of Virginia Carol Kennedy, again, other than conclusory allegations and assertions, the State has made no showing that it could elicit nonprivileged nonconfidential information from Mr. Sears that would be material evidence in its case in chief.

The State has given this Court no legitimate reason to grant its motion.

5. Other Reasons Also Counsel Against Granting This Motion.

There are other reasons that counsel against the granting of a deposition, particularly in the absence of any preliminary showing by the State. What testimony is the State seeking from Mr. Sears? Is the information privileged? Is it confidential? If so it may not be elicited. Is it cumulative? If so it is not admissible and certainly is not material. See Rule 403, Ariz. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") Is the evidence attainable from other sources or witnesses other than Mr. Sears? If so, again, it is cumulative and not material.

Frankly, we don't actually know the answers to these questions, and neither does the Court, because the State has not made any showing. Separate and apart from any inchoate analysis under Rule 403, however, we do know that the State alleges that Mr. DeMocker engaged in financial improprieties and that he did not do so alone,

perhaps even with the assistance of counsel. That not only raises several other potential issues that will have to be confronted, but given nature of these allegations, and given Mr. Sears' relationship with Mr. DeMocker over the last three years, why would he or any similarly situated individual agree to answer any questions posed by the State?

Although we think the State's various assertions on this issue are at the very least misguided, they are no less troubling and problematic even to an innocent man. In *Ohio v. Reiner*, the United States Supreme Court expressly recognized that "one of the Fifth Amendment's 'basic functions ... is to protect *innocent* men ... who otherwise might be ensnared by ambiguous circumstances.'" 532 U.S. 17 (2001) (citing *Grunewald* v. *United States,* 353 U.S. 391, 421 (1957) (quoting *Slochower* v. *Board of Higher Ed. of N.Y. City,* 350 U.S. 551, 557-558 (1956)) (emphasis in original)

At this point, absent some kind of showing by the State, Mr. Sears can only reserve a host of other potentially applicable objections.

CONCLUSION

The State has not met its burden of proving that Mr. Sears is or could be a material witness. Its motion for his deposition should be denied.

RESPECTFULLY SUBMITTED August 10, 2011.

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